A

SONY ELECTRONICS (M) SDN BHD

v.

DIRECT INTEREST SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: P-03-29-2005]

C

15 DECEMBER 2006

CIVIL PROCEDURE: *Damages - Assessment of damages - Appeal - Whether trial judge justified in setting aside nominal damages granted by senior assistant registrar - Whether damages for loss of profits and capital supported by evidence*

D

This was the appellant's appeal against the assessment of damages by the trial judge of the High Court. The trial judge had set aside the nominal damages of RM500 granted by the senior assistant registrar before awarding the respondent RM900,000 in damages for loss of profits and capital. The respondent's claim for damages against the appellant arose due to the appellant's untimely termination of an agreement between the parties that resulted in losses to the respondent.

E

F

Held (allowing the appeal)
Per Zainun Ali JCA:

(1) The respondent failed to prove the contents of the audited statements of accounts tendered and how the alleged loss of profits came about. The oral evidence given in connection therewith also lacked proof. The respondent too failed to comply with s. 64 of the Evidence Act 1950 requiring primary evidence of documentary evidence tendered. (paras 46, 47, 48, 49, 54, 55 & 56)

G

H

(2) Although the appellant did not object to the audited statements of account, the appellant had nevertheless put the court on notice that the said statements were handed in only on the day of the trial itself and that the appellant's request for an adjournment was refused. (para 58)

I

(3) The mere fact that the audited statements of accounts were marked as exhibits did not formalise their existence in the absence of correct and proper tendering thereof. (para 62)

(4) The documents upon which the documentary evidence was based were not produced or tendered in court. Even if the authenticity of the statements was not called in question, it was still incumbent upon the respondent to prove their contents and to show how they were related to the alleged breach of the agreement. Further, pursuant to s. 34 of the Evidence Act 1950, in the absence of a person of skill to prove the respondent's documents, the respondent's claim for damages remained obscure, unacceptable and consequently inadmissible. (paras 65, 66, 67, 68, 71 & 72)

(5) The trial judge's award of RM150,000 as damages for loss of capital was without basis, having regard firstly to the fact that the respondent had not even pleaded or claimed for loss of capital. Further, besides the statements of account being inadmissible, the respondent did not adduce any other evidence to establish the amount of capital invested in the business. Neither was there evidence adduced to establish the manner in which the capital was employed in the business nor how the capital was depleted. The trial judge's award of RM150,000, therefore, was unsupported by any evidence and was capricious. (paras 79, 80 & 81)

(6) Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. The issue in the present case was one of proof rather than absence of loss. It was an absence of evidence of the amount of loss. The respondent failed to prove this loss from the appellant's breach of the agreement. In a situation where there is an infringement of a legal right but where there is no basis to ascertain the amount of loss suffered, a nominal damage may be awarded. (paras 87 & 90)

[Damages awarded by trial judge set aside; nominal damages awarded by senior assistant registrar restored.]

A ***Bahasa Malaysia*** *translation of headnotes*

Ini adalah rayuan perayu terhadap taksiran gantirugi yang diputuskan oleh hakim bicara di Mahkamah Tinggi. Hakim bicara telah mengenepikan gantirugi nominal RM500 yang diberi oleh
B penolong kanan pendaftar sebelum mengawardkan gantirugi RM900,000 kepada responden kerana kehilangan keuntungan dan modal. Tuntutan responden terhadap perayu berbangkit dari tindakan perayu menamatkan perjanjian di antara mereka secara yang tidak wajar sekaligus menyebabkan kerugian kepada
C responden.

Diputuskan (membenarkan rayuan)
Oleh Zainun Ali HMR:

(1) Responden gagal membuktikan kandungan penyata akaun
D beraudit yang dikemukakan dan bagaimana kerugian keuntungan yang dikatakan itu boleh berlaku. Keterangan lisan yang diberikan mengenai perkara ini juga ketandusan bukti. Responden juga gagal mematuhi s. 64 Akta Keterangan 1950 yang mengkehendaki supaya keterangan primer dikemukakan.

E

(2) Walaupun perayu tidak membantahi penyata akaun beraudit, perayu telah meletakkan mahkamah atas notis bahawa penyata-penyata tersebut hanya diserahkan pada hari perbicaraan dan bahawa permohonan perayu untuk
F penangguhan telah ditolak.

(3) Fakta bahawa penyata akaun beraudit telah ditanda sebagai eksibit semata-mata tidak membuktikan kewujudannya jika pengemukaannya tidak dibuat dengan betul dan teratur.

G **(4)** Dokumen-dokumen yang menjadi asas kepada keterangan dokumentar telah tidak dikemukakan di mahkamah. Jikapun kesahihan penyata-penyata tidak dipersoalkan, responden masih bertanggungjawab untuk membuktikan kandungannya dan menunjukkan bagaimana ia berkaitan dengan kemungkiran
H perjanjian yang didakwakan itu. Selain itu, berdasarkan s. 34 Akta Keterangan 1950, dalam ketiadaan seorang yang pakar untuk membuktikan dokumen-dokumen responden, tuntutan responden untuk gantirugi adalah kabur dan tertolak dan tak boleh diterima-masuk.

I

(5) Award RM150,000 oleh hakim bicara sebagai gantirugi kerana kehilangan modal adalah tak berasas, pertama sekali mengambilkira bahawa responden tidak pernah memplid atau menuntut kehilangan modal. Selain itu, selain penyata akaun tidak dapat diterima-masuk, responden tidak mengemukakan keteranagn lain bagi membuktikan jumlah modal yang dilaburkan di dalam perniagaan. Juga tidak terdapat keterangan yang menunjukkan bagaimana modal tersebut digunakan untuk perniagaan, atau bagaimana ia menjadi berkurangan. Oleh yang demikian, award RM150,000 oleh hakim bicara tidak disokong oleh apa-apa keterangan dan adalah tidak kukuh.

(6) Gantirugi nominal boleh diaward di mana fakta mengenai kerugian dibuktikan walaupun keterangan mengenai jumlahnya tidak dikemukakan. Isu dalam kes di sini adalah mengenai bukti dan bukannya mengenai ketidakwujudan kerugian. Ia adalah mengenai ketiadaan keterangan berkaitan kerugian. Responden gagal membuktikan kerugian akibat dari kemungkiran perjanjian perayu. Dalam keadaan di mana terdapat pelanggaran sesuatu hak undang-undang, tetapi di mana tiada asas untuk menentukan kerugian yang dialami, satu gantirugi nominal boleh diawardkan.

[Gantirugi yang diaward oleh hakim bicara diketepikan; gantirugi nominal yang diberi oleh penolong kanan pendaftar dikekalkan.]

Case(s) referred to:

FACB Bhd v. Hoo See Sin & Ors [2003] 4 CLJ 667 HC ***(dist)***
Guan Soon Tin Mining Co v. Ampang Estate Ltd [1973] 1 MLJ 25 ***(refd)***
Johnson v. Kershaw 63 ER 1059 ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Sykes v. Midland Bank Executor & Trustee Co Ltd [1971] 1 QB 113 ***(refd)***
The Mediana [1900] AC 113 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 34, 64

For the appellant - KC Tang (Chan Ju Jin with him); M/s Shearn Delamore & Co
For the respondent - M Thayalan (See Ching Ling with him); M/s Thayalan & Assoc

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-110-1998]

Reported by Usha Thiagarajah

JUDGMENT

Zainun Ali JCA:

[1] The appeal before us is against the decision made on 7 March 2005 by the learned trial judge of the High Court on the assessment of damages only. The trial judge had awarded the respondent total damages of RM900,000 together with interest at 8% per annum from the date the action was filed until full realisation.

[2] The trial judge had thereby set aside the decision of the deputy registrar made earlier on 5 July 2004 who awarded nominal damages of RM500 only to the respondent.

[3] The question of liability was decided by the said trial judge on 8 June 2001 where he allowed the respondent's claim against the appellant. The trial judge did not make any order on damages but ordered that damages be assessed by the senior assistant registrar. The appellant appealed to the Court of Appeal against both these orders *via* Civil Appeals No. P-02-614-2001 and P-02-1077-2001 respectively. On 6 July 2004, the Court of Appeal dismissed both appeals.

[4] Thus the threshold position of the appellant's liability was determined.

Background Facts

[5] The respondent is a company having its registered office at No. 2683 2nd Floor Jalan Chain Ferry, Taman Inderawasih Butterworth, Pulau Pinang.

[6] The defendant is a company operating at Prai Trade Zone, Prai Industrial Estate Pulau Pinang.

[7] It is the respondent's case that in or about 1993, one Encik Ramlan b. Osman (SPI) (hereinafter referred to as "Ramlan"), who was then Head of the Appellant's Transport Department, was encouraged by the appellant company's Group Head of Corporate Planning, one Mr. Satoshi Hiramoto, that should he (Ramlan) leave the appellant company, the said appellant company will award him the appellant's transport business.

[8] The said Ramlan then left the appellant company and incorporated the respondent company.

[9] According to the respondent, the appellant and the respondent entered into a written agreement dated 20 May 1994, wherein the respondent transported goods to and from the appellant's factory premises. The agreement was for 10 years ie, from 4 April 1994 until 4 April 2004.

[10] There were two main services rendered by the respondent to the appellant. They were:

(a) Milk Run Truck Services (MRTS)

And

(b) Direct Delivery Service (DDS)

[11] The MRTS started in April 1994 and was terminated on 15 February 1996, whilst the DDS started in April 1994 and was terminated in September 1997.

[12] It is the respondent's case that the untimely termination of the agreement by the appellant resulted in losses to the respondent as pleaded in its statement of claim.

[13] The respondent's case for damages as pleaded in the statement of claim dated 10 March 1998 is as follows:

> In para. 6, the respondent pleaded that 14 trucks were purchased under hire purchase agreements and lease agreements pursuant to the said agreement.
>
> In para. 8, the respondent pleaded that as a result of the appellant's breach of the said agreement, the respondent's creditors had repossessed 5 of their trucks and commenced legal proceeding against the respondent.
>
> The respondent's claim is as follows:
>
> (a) loss of profits at the rate of RM600,000 per year for eight years – RM4,800,000
>
> (b) balance outstanding to the debtors under the hire purchase agreement – RM1,335,044.42
>
> (c) balance owing to Bank Bumiputra Malaysia Berhad – RM700,000

[14] As the appeal is only as regards quantum of damages, it is now timely to look at the quantum awarded to the respondent.

[15] On 7 March 2005, the learned High Court Judge awarded the following to the respondent:

(a) Loss of profits – RM750,000

(b) Loss of capital – RM150,000

and interest at the rate of 8% per annum from the date of the action being filed until full realization.

[16] It is the respondent's case that under the 1994 Agreement the respondent was to provide 60 units of 8 ton bonded trucks each month, to transport the appellant's goods to and from the appellant's factory.

[17] Paragraph 5 of the said agreement provides that the agreement is for a duration of 10 years commencing from 4 April 1994 till 4 April 2004.

[18] Pursuant to the agreement, the respondent bought 14 trucks and expended sums of money to establish its office.

[19] It is the respondent's case that in or about early 1996, the appellant breached this agreement; that subsequently the appellant awarded its transport services to its subsidiary, resulting in a decline in the respondent's income derived from providing this transport service to the appellant from RM3,574,323 in 1995 to RM435,920 in 1997 till September. According to the respondent, (pp. 112 and 113 of the rekod rayuan) the volume of the business dealing between the appellant and respondent is as follows:

(a) For 1994 the total was RM4,417,443;

(b) For 1995 (until March 1996) the total was RM4,257,732.05;

(c) For 1996 (until March 1997) the total was RM1,514,618.72;

(d) For 1997 (ie, until March 1998), the total was RM330,257.50.

The above figures, according to the respondent indicate significant reduction in turnover when the MRTS and DDS were terminated.

[20] It is the respondent's case that pp. 112 and 113, as explained by Ramlan (SPI), relate to the dealings between the appellant and the respondent, where the details of payment are reflected at pp. 114 to 201 of the rekod rayuan.

[21] The respondent also indicated the number of trucks they utilized (p. 220-228 of rekod rayuan) and indicated that the respondent also hired/purchased the trucks for the said transport services to the appellant.

[22] The respondent through Ramlan tendered in court its audited statements of account for the years 1995 to 1999 (see exhs. P2A, P2B, P2C, P23 and P2E.).

[23] It is the respondent's case that since the MRT was terminated on 15 February 1996 and the DDS terminated in September 1997, the decrease in turnover as reflected in P2A, P2B, P2C, P2D and P2E are indicative of the losses suffered by them as a result of the appellant's breach of the agreement.

[24] It is also the respondent's case that Ramlan's tendering of the audited accounts for the years 1995 till 1999 met with no objection from the appellant. Neither was Ramlan cross-examined on his evidence by the appellant.

The Appellant's Case

[25] It is the appellant's case that though the respondent's submission sets out that the issue is one of quantum, there is hardly anything in the respondent's submission to support the said claim for losses arising from the alleged breach of the agreement.

[26] The appellant contends that the audited account for the years 1995 to 1999 referred to by the respondent do not show how the loss is attributable to the alleged breach, bearing in mind that the MRS services was terminated on 15 February 1996 and the DRS was terminated on September 1997.

[27] The appellant went on to submit that no evidence was led to the computation of the loss/losses allegedly suffered.

[28] The appellant submitted, that the stacks of bills and payments, the audited statements and the hire purchase documents, do not by themselves establish the loss, if any, suffered by the respondent.

[29] The appellant submits that for example, no evidence at all was adduced in support of the loss/losses allegedly suffered whether in the sum of RM6,835,044.42 under para. 9 of the statement of claim or otherwise and it is misconceived for the respondent to submit that the appellant is deemed to have accepted all evidence of the respondent regarding the alleged loss.

[30] More importantly, it is the appellant's case that the failure of the respondent to produce the account books or the documents upon which the said audited statements of account were based, is also contrary to s. 64 Evidence Act 1950, requiring that when documentary evidence is tendered, primary evidence of the document (production of the documents itself) is essential.

[31] According to the appellant the respondent made much of the appellant's failure to object to the audited statements of account.

[32] It is the appellant's case that the fact that the appellant counsel did not object to the audited statements of account does not render the said document admissible or relevant – per Edger Joseph Jr. J in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635.

[33] The appellant went on to say that the appellant counsel could not have admitted to the said audited statements of account. This is clear when the appellant had earlier informed the court that the said audited statements were handed in only on the day of the trial itself and that the appellant counsel had requested for an adjournment to take instructions, which the trial judge had clearly refused.

[34] As the relevant excerpt from the notes of evidence would show:

> … Saya (Ramlan b. Osman (SPI)), kemukakan penyata akaun Plaintiff.
>
> Peguam Defendan : Tidak membantah – tetapi menarik perhatian dokumen ini baru ditunjuk kepada saya, saya pohon tangguh untuk mendapat arahan dari anakguam saya.

[35] Thus it is the appellant's case that although his counsel had not called for the production of the account books or the necessary support documents, the appellant had never at any point in time, dispensed with formal and proper proof of damages. The appellant was also quick to point out that even the trial judge himself had, in the course of Ramlan's evidence commented as follows:

> Peguam Defendan dilihat tidak membantah yang sepatutnya dibantah kerana dokumen ini tak admissible …

[36] The appellant submitted that even if the audited statements of account are admissible (which is denied), they do not show how the alleged losses for the years 1997, 1998 and 1999 had come about. In fact the appellant's contention is that the audited statements are unhelpful in determining the loss, if any, suffered by the respondent as the respondent had in the period 1 April 1995 up to 31 March 1996 and also for the period up to 31 March 1997, made a profit.

[37] With regards the Transportation Receivables for the years 1994-1997 (whether from Sony Logistics (M) Sdn Bhd/Sony Electronics (M) Sdn Bhd), these are not admissible on account of their not being tendered as exhibits, even if they were referred to by Ramlan in his evidence.

[38] The point is, as the appellant would contend, the oral evidence of Ramlan as Managing Director, by itself, whether in relation to the audited statements of account or the Transportation Receivables, has no probative value whatsoever, on account of the inadmissibility of the said documents. Consequently it is the appellant's contention that they are not obliged to cross-examine on such evidence.

[39] It is pertinent to now scrutinize the judgment on quantum of the trial judge, dated 4 January 2006.

The Trial Judge's Award

[40] The trial judge awarded the sum of RM750,000 for loss of profit and RM150,000 for loss of capital. In calculating the amount of RM750,000 as loss of profit, the trial judge relied on the following:

(a) That for the year ending 1995 (the 1st year of operation), the respondent had suffered a loss;

(b) That for the year ending 1996, the respondent had made a profit of RM158,945 (before taxation);

(c) That for the years ending 1997, 1998 and 1999 the respondent had suffered losses.

[41] The trial judge also found that the Transport Receivables (Sony Logistics (M) Sdn Bhd) for the years 1994 – 1997 and Transport Receivables (Sony Logistics (M) Sdn Bhd) for the years

1994 – 1997 do establish the decline in value of the services rendered to the appellant prior and subsequent to the termination of the services which are as follows:

Year ending 31 December 1994 – RM4.4. million

Year ending 31 December 1995 – RM4.2 million

Year ending 31 December 1996 – RM1.5 million

Year ending 31.12.1997 - A further reduction of 40%, that Ramlan's evidence on the respondent's damages was not challenged by the appellant.

So much for the award for loss of profit.

[42] The trial judge also awarded the respondent RM150,000 for loss of capital.

[43] In arriving at this figure, the trial judge based his calculations on the following:

(a) That the audited statements of account (P2A-P2B) do establish that the authorized and paid up capital of the respondent is RM500,000;

(b) That the damages suffered by respondent as a result of the loss of paid up capital is 30% ie, RM150,000.

[44] Thus the question before us is this. Had the trial judge acted on right principles and therefore correctly estimated the amount of damages awarded to the respondent? We shall see.

[45] After having heard counsel for both the appellant and respondent and read the cause papers and authorities cited, we find that the trial judge had no basis to set aside the award of nominal damages made by the senior assistant registrar and substituting it with the total damages of RM900,000 plus interest at 8% per annum from date of action filed till full realization.

Our reasons are as follows:

Award Of Loss Of Profits – RM750,000

[46] It is clear that the statements of account marked as exh. P2A, P2B, P2C, P2D and P2E are by themselves, not sufficient to establish the respondent's claim for damages.

[47] They only show profit for 1996 and 1997. They do not show how the alleged loss had come about. A

[48] Even in Ramlan's testimony as evident from pp. 69 onwards (rekod rayuan), although details were given, for example where it is shown that the volume of services reached RM483,278.15 from April 1994 – March 1995 and it was subsequently reduced to a mere RM1.1 million in 1996 and plunged to RM300,000 in 1997, the respondent failed to prove the contents and show how their contents were related to the alleged breach of the agreement. No evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered therefrom flowing from the breach. B C

[49] The respondent's failure to produce or tender the account books or the necessary support documents upon which the audited statements of account were based is fatal to his claim, for damages. Thus we find that the audited statements of account and Ramlan's oral evidence in connection therewith, are inadmissible. D

[50] The case of *Johnson v. Kershaw* 63 ER 1059, which was followed in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 illustrates the above position. The Vice-Chancellor in *Johnson v. Kershaw* had observed: E F

> … If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr. Seet as to their contents.

G

[51] Though it was put across by the respondent that Ramlan as Director of the respondent, was also the maker of the audited statements of account, and that therefore the said audited statements were properly tendered and accepted at the trial, nothing was further from the truth. H

[52] We found nothing in the notes of evidence to show that Ramlan is the maker of the audited statements of account in that he had personal knowledge of the contents or that he had signed the said audited statements. I

[53] Even if Ramlan had in fact been the maker of the audited statements of account, it is still incumbent upon him to produce the books of account upon which the audited statements were based (see *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1, p. 21-22 and *Popular Industries Ltd v. Eastern Garment* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635).

[54] It was submitted by the appellant counsel that the said audited statements of account are inadmissible by virtue of the respondent's failure to comply with s. 64 of the Evidence Act, 1950 requiring that when documentary evidence is tendered, primary evidence of the document ie, the production of the documents itself is essential.

[55] Mohamed Dzaiddin SCJ (as he then was) in *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1 observed thus:

> … when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under Section 65 of the Evidence Act 1950 …

This appears to be the correct legal position.

In fact the court in the *KPM Khidmat* observed case that:

> ... The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover the record book upon which the maker based her summary must be in evidence …

[56] Thus the respondent's failure to observe the evidential requisites in this case would prove to be his undoing.

[57] We find that the respondent made much of the appellant's failure to raise objection to the said audited statements of account, where even the trial judge had himself commented on its inadmissibility.

[58] This peculiar circumstance is heightened when we found in the notes of evidence that whilst the appellant counsel did not object to the audited statements of account, he had nevertheless put the court on notice that the said audited statements were handed in only on the day of the trial itself. He then requested the court for an adjournment to take instructions, but this request was however refused.

[59] Edgar Joseph Jr. J in *Popular Industries Ltd v. Eastern Garment Manufacturing* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 cited *Sarkar on Laws of Evidence* as follows:

> … An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the Court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties …

[60] Thus, even though the appellant counsel had not called for the production of the accounts books or the necessary support documents the Appellant had never at any point in time dispensed with formal and proper proof of damages – (see *Guan Soon Tin Mining Co. v Ampang Estate Ltd* [1973] 1 MLJ 25).

[61] By the same token we find that the appellant was not obliged to cross-examine Ramlan on his oral evidence thereon, when it is clear that the said audited statements of account and oral evidence were irrelevant and insufficient to establish the respondent's claim to damages.

[62] We might add that the mere fact that the audited statements were marked as exhibits in no way formalize their existence in the absence of correct and proper tendering thereof. This is especially true when the respondent had failed to discharge their duty to properly tender or prove the said audited statements.

Transportation Receivables For The Years 1994 – 1997

[63] The Transportation Receivables [AR 114 to 201] and Truck Utilization Schedules [AR220 – 228] are documents disclosed in the respondent's bundle of documents. However, the Transportation Receivables for 1994 – 1997 whether from Sony Logistics (M) Sdn Bhd or from Sony Electronics (M) Sdn Bhd are not admissible in that the documents upon which the Transportation Receivables were based, had not been produced or tendered in court.

[64] Likewise, the Truck Utilization Schedules were also not tendered or marked. At the end of the trial both the Transportation Receivables and Truck Utilization schedule were not formally proved nor admitted as evidence.

[65] Although the notes of evidence indicate that Ramlan is the maker of the Transportation Receivables, there is nothing in the evidence to show that the said documents were source documents upon which the said audited statements of account were based.

[66] Thus even if the authenticity of the statements was not called into question, it is still incumbent upon the respondent to prove their contents and to show how they are related to the alleged breach of the agreement (if respondent were to depend on the said documents to prove its case).

[67] We would go further and say that even if the source documents, ie, account books were in evidence, the one vital link which is missing is the presence of a person of skill, of whom Ramlan is not one.

[68] This person of skill is required, on the strength of s. 34 of the Evidence Act, to prove the entries and documents as he is "someone having personal knowledge of the transactions reflected in such entries …"

[69] His 'skills' would be critical in this case, in giving professional input as regards, *inter alia*:

(a) The percentage of the loss;

(b) Whether the loss is due to the loss of a particular contract;

(c) Giving a comparative study of business trend of the respondent (calculating loss of future business);

(d) In calculating gross margin or the net margin;

(e) Chart the performance of the company etc.

[70] As in the *Popular* case, there was also a set of purportedly audited accounts but which lack:

(a) Books to substantiate the statements;

(b) Accountant/accountants who themselves audited the accounts to testify to the truth and accuracy of the statements.

[71] If the said accounts were to be admitted, then someone is to testify from where they were obtained.

[72] Thus in the absence of that person of skill to prove the respondent's documents, the respondent's claim for damages remain obscure, unacceptable and consequently inadmissible.

[73] The essence of all these is that, the burden of proof in terms of admissibility and relevancy never shifted from the respondent.

[74] The respondent was at pains to distinguish the authorities relied upon by the appellant (ie, *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 and *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1989] 3 CLJ 1) on the grounds that the said cases do not involve audited accounts being tendered as evidence.

[75] However it is our view that this distinction has no basis since the nature of an audited account in the instant case, is no different from the "sheet of calculations" tendered in the *Popular* case, or the "summary of accounts" tendered in the *KPM Khidmat* case, as these documents are nothing more than general **conclusions** or **results** from the books of account or record books. (our emphasis).

[76] Thus, it would follow that the principles as adopted in both the *Popular* and *KPM Khidmat* cases remain binding and applicable.

[77] The respondent's attempt to fortify his position and lend credence to his audited accounts by citing the case of *FACB Bhd v. Hoo See Sin & Ors* [2003] 4 CLJ 667, fell through. The respondent contended that the audited account of a company may be used to determine the profitability or otherwise of a company. However this is actually unhelpful to the respondent when the said audited account had not been properly tendered or proved.

[78] In fact the *FACB* case is distinguishable from the instant case and would countermand the respondent's position, since in the *FACB* case, … both the plaintiff and the defendant agreed that the said financial years were properly audited and they had no quarrel with that and that the auditor of the audited statements was in fact called to testify on the audited statements in question …" However this is not so in the instant case.

The Trial Judge's Award Of RM150,000

[79] We find that the trial judge's award of RM150,000 as damages for loss of capital is without basis having regard firstly to the fact that the respondent had not, in their writ of summons and statement of claim even pleaded or claimed for loss of capital.

[80] The trial judge indicated that he computed this amount by referring to the authorized and paid-up capital of RM500,000 in the audited statements of account.

[81] However bearing in mind our conclusion that:

(a) the said statements of account are inadmissible;

(b) the fact that no other evidence was adduced by the respondent to establish the amount of capital that had been invested in the business;

(c) that no evidence had been adduced by the respondent to establish the manner in which the capital had been employed in the business;

(d) that no evidence had been adduced by the respondent to establish how the capital had been depleted or used up as a result of the breach of the said respondent,

the trial judge's award of RM150,000 was unsupported by any evidence and was therefore capricious.

[82] To compound the problem, the trial judge had himself expressed misgivings about the respondent's claim to damages and in fact had made no award of damages on 7 November 2001, ie, the day fixed for decision on damages, but had instead instructed the senior assistant registrar to assess damages, notwithstanding that written submissions on the issue of damages had already been filed (as directed by him).

[83] In the light of the evidence before us, we find that it is irrefutable that the respondent in seeking the damages as set out in the statement of claim, has the burden of proving both the fact and the amount of damages before he can recover.

[84] In this case, apart from the fact that the said audited statements of account, Ramlan's oral evidence on the said statements and his evidence in relation to documents are all not formally proved are inadmissible evidence, the said evidence in themselves do not in any event establish that the respondent has suffered any damage nor shown the nature and extent of the loss allegedly suffered as a result of the appellant's breach of contract.

[85] As a consequence of the above, we find that the amount of damages awarded by the trial judge to the respondent to be arbitrary and clearly wrong.

[86] The next question is whether the award of RM500 as nominal damages handed down by the senior assistant registrar was correct and justified.

Nominal Damages

[87] Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. Although this is one of many situations in which nominal damages may be awarded, "it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss" (see McGregor on *Damages* Chapter 10).

[88] In the instant case, the issue is one of proof rather than absence of loss. It is an absence of evidence of the amount of loss.

[89] AS Lord Halsbury LC succinctly stated in *The Mediana* [1900] AC 113:

> … Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

[90] In the instant case, we find that the respondent has clearly failed to prove this loss it allegedly suffered from the appellant's breach of contract. In a situation where there is an infringement of a legal right such as this, but where there is no basis for ascertainment of the amount of loss suffered, a nominal damage may be awarded (see *Sykes v. Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113.

[91] My learned brother Datuk James Foong and my learned sister Datin Paduka Zaleha Zahari have seen this judgment in draft and are in agreement with it.

[92] In view of the above, it is the decision of the court that the trial judge had clearly erred in awarding the said amount of damages he did. In the circumstances, we unanimously allow the appeal with costs, set aside the damages awarded by the trial judge, and restore the nominal damages of RM500 as awarded by the senior assistant registrar. Deposit of appeal to be refunded to appellant.